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Vietnam's Labor Law: Can Labor Peacefully Coexist with Foreign Investment, Economic Development, and Structural Reform

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Vietnam's Labor Law: Can Labor Peacefully Coexist With Foreign Investment, Economic Development, and Structural Reform?

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I. INTRODUCTION

Vietnam, a country with a population of over seventy-one million,¹ has faced international isolation since the United States imposed a trade embargo on April 30, 1975.² With only a minimal influx of western foreign capital forthcoming,

1. Vietnam, THE WORLD FACTBOOK, Feb. 16, 1994, at 2, available in LEXIS, World Library, Profil File.

2. Peter G. Furniss, *The United States-Vietnam Trade Relationship: Politics and Law in the Process of Normalization*, 35 HARV. INT'L L.J. 238 (1994), available in WESTLAW, Tp-All Database (explaining that with the fall of Saigon and the U.S. withdrawal from South Vietnam, the U.S. imposed trading restrictions

Vietnam was forced to rely heavily upon support from its socialist neighbors.³ With the recent dissolution of the Soviet Bloc and the curtailment of Soviet aid,⁴ Vietnam reformulated its economic strategy and opened its doors to western foreign investors.⁵ In response, on February 3, 1994, the United States lifted the trade embargo against Vietnam, allowing U.S. companies to invest and trade with Vietnam.⁶

However, to insure a stable market that will attract foreign investment, Vietnam must establish a sound legal system based on enforceable laws and regulations.⁷ Vietnam's current laws consist of little more than general legal

against the communist North Vietnam). See James Taylor, Jr., *Vietnam: The Current Legal Environment for U.S. Investors*, 25 LAW & POL'Y INT'L BUS. 469 (1994), available in WESTLAW, Tp-All Database (citing Vietnam's isolation as a product of U.S. withdrawal from South Vietnam in 1975 along with Vietnam's embrace of the Soviet Bloc and communist political system).

3. MICHAEL C. WILLIAMS, *VIETNAM AT THE CROSSROADS* 42 (1992). The government anticipated that China and the Soviet Union would provide roughly two thirds of Vietnam's foreign investment, with the remainder supplied by the West. *Id.* Comecon [The Council for Mutual Economic Assistance] accepted Vietnam as its tenth member and provided the aid and assistance that probably saved Vietnam from complete economic collapse. *Id.* at 43; see THOMAS W. HOYA, *EAST-WEST TRADE COMECON LAW AMERICAN-SOVIET TRADE* 4-5 (1984) (indicating that the Soviet Union and East European nations formed Comecon in 1949 to provide mutual assistance and foreign trade to each other).

4. JUDITH BANISTER, *VIETNAM POPULATION DYNAMICS AND PROSPECTS* 5 (1993). The Soviet Union once supported Vietnam's weak economy, but because of the Soviet Union's economic deterioration and inability to meet its own enormous economic demands, it rapidly curtailed economic assistance to Vietnam. *Id.* In response to the cut in aid, the Vietnamese leadership viewed foreign investment as a principal means to inject much needed capital into its reeling economy. *Id.* at 6; see Mike Yeong, *New Thinking in Vietnamese Foreign Policy*, 14 CONTEMP. S. E. ASIA 257, 261-62 (1992) (explaining that the cut in economic aid from the Eastern European states also resulted in the termination of employment and the mass return of Vietnamese nationals from those countries, which compounded Vietnam's social and employment difficulties). Cf. VO NHAN TRI, *VIETNAM'S ECONOMIC POLICY SINCE 1975*, 224, 225 (1990) (noting that part of Vietnam's economic concern stemmed from its rising debt, which increased from US\$7.65 billion at the end of 1986 to US\$8.62 billion by the end of 1987).

5. Taylor, *supra* note 2, at 469. See *Official English Text of SRV Investment Code*, Dec. 29, 1987, art. 1 [hereinafter *1987 Foreign Investment Law*], available in Indo-China Studies Center at U.C. Berkeley [hereinafter ICSC-UCB], SRV File, Legal Subject (on file with *The Transnational Lawyer*) (stating that the Vietnamese government encourages foreign and private enterprises to invest capital and technology in Vietnam); *Vietnam's Transition to a Market Economy*, E. ASIAN EXEC. REP., Jan. 15, 1994, at 8 (discussing Vietnam's export-oriented approach to economic development).

6. Taylor, *supra* note 2, at 469 (explaining that the lifting of the trade embargo resulted from a series of negotiations and initiatives intended to normalize relations between the countries). At the foremost was resolving the POW/MIA issue, with approximately 2000 servicemen still listed as missing in action. *Id.*; see *Vietnam and the USA—A Move Long Overdue*, BUS. TIMES, Feb. 5, 1994, available in LEXIS, Asiapac Library, Allasi File (hypothesizing that economics were the predominant force behind the U.S. decision to lift the trade embargo).

7. John Gillespie, *Foreign Investment in SR Vietnam Revisited*, 18 INT'L BUS. LAW. 416 (1990). Substantial international reluctance to invest can be attributed to the lack of codification of commercial laws and the tenuous distinctions between the roles of constitutional government and the Communist Party. *Id.*; see *Vietnam: A Development Perspective*, in SOCIALIST REPUBLIC OF VIETNAM iii (Sept. 1993) (on file with *The Transnational Lawyer*) (affirming that the government must restructure its legal system); TRI, *supra* note 4, at 249 (postulating that Vietnam must resolve many problems concerning rules and institutions if it intends to expand its relations with the outside world); Dana Sachs, *Vietnam: Investment Series #6—Law—The Centerpiece*

principles which only provide minimal guidance to foreign investors.⁸ As seen in the economic industrialization policies of other Asian nations,⁹ governments often encourage rapid foreign investment by offering low wages and foreign autonomy at the expense of the nation's labor force.¹⁰ As a socialist state, Vietnam faces a particularly difficult dilemma should it follow a similar development course, since the state serves as the protectorate of the working class and also as the active promoter of foreign investment.¹¹ To resolve many of the uncertainties surrounding Vietnam's labor policies, the National Assembly enacted the Labour Law (Labor Law) on June 17, 1994, which codifies numerous enterprise practices, regulations, and rights.¹² As a result, transnational practitioners must adequately advise clients as to the detailed rights and regulations in Vietnam's Labor Law.¹³

of an Open Door Policy, VIETNAM INV. REV., Nov. 1, 1993, available in LEXIS, Asiapc Library, Vietnm File (addressing Vietnam's disorganized system of ordinances and laws prior to 1987, which when applied were confusing and ineffective).

8. Taylor, *supra* note 2, at 470 (discussing Vietnam's developmental legal system and its numerous ambiguities, which increase the risk of investment); see also *Vietnam's Transition To a Market Economy*, *supra* note 5, at 8, available in LEXIS, Intlaw Library, Easian File (recognizing the need to reform its legal system, Vietnam embarked on a campaign to revise its constitution and formulate imperative laws and decrees to enhance the development of its legal system).

9. Amii Larkin Barnard, *Labor Law in Malaysia: A Capitalist Device to Exploit Third World Workers*, 23 LAW & POL'Y INT'L BUS. 415 (1992); see Andrew J. MacIntyre, *Indonesia, Thailand and the Northeast Asian Connection*, in PACIFIC ECONOMIC RELATIONS IN THE 1990S COOPERATION OR CONFLICT? 250, 250-55 (Richard Higgott et al. eds., 1993) (discussing the economic achievements of South Korea, Taiwan, Hong Kong, and Singapore).

10. Barnard, *supra* note 9, at 415; see Kojo Yelapaala, *The Impact of Industrial Legislation on the Behavior of Multinational Enterprises and Labor in the Industrializing Countries of East and Southeast Asia*, 6 MICH. INT'L LEGAL STUD. 383, 404 (1984) (criticizing the export-oriented industrialization policy which utilizes the comparative advantage of an abundant and cheap labor force).

11. Carolyn Gates, *Is Labour Vietnam's Comparative Advantage?*, BUS. TIMES, Dec. 31, 1994, at 3, available in LEXIS, Asiapc Library, Allasi File. The Vietnamese government desires rapid growth through an improved market-oriented labor system, but fears sacrificing the nation's past socio-economic gains. *Id.* at 4. Most notably, it does not want to raise doubt as to its political *raison d'etre*, which is a serious possibility if the government neglects the communist party and the workers' state. *Id.*

12. Labor Law, reprinted in BUS. VIETNAM, Aug.-Sept. 1994, at 26-43 (on file with *The Transnational Lawyer*); see *Constitution*, *infra* note 34, art. 83 (establishing the National Assembly as the supreme state constitutional and legislative authority, whose function is to direct domestic, foreign, economic, and social policy); *Indochina: Vietnam, Laos, Cambodia Country Report No. 31992*, THE ECONOMIST INTELLIGENCE UNIT, 1992, available in ICSC-UCB, SRV File, Periodical File (on file with *The Transnational Lawyer*) (noting that the National Assembly consists of a 395 member unicameral body, with elections every five years); *Vietnam's Developing Legal System*, THE VIETNAM NEWSLETTER, May 1, 1991, available in ICSC-UCB, SRV File, Legal Subject (on file with *The Transnational Lawyer*) (stating that the National Assembly passes laws; the State Council issues Ordinances and Decrees; the Council of Ministers issues Decrees and implements regulations encompassed with a Decree); *Vietnam: Frequent Regulation Changes Can Snag Investment in VN—Report*, BANGKOK POST, Dec. 13, 1994, available in LEXIS, Asiapc Library, Allasi File (mentioning Vietnam's important employment legislation, codified in the Labor Law, which became law on June 24, 1994, and was implemented on January 1, 1995).

13. Labor Law, *supra* note 12, at 26-43.

This comment presents a historical background to the economic developments affecting Vietnam's labor law and discusses the impact of the Labor Law upon foreign investment. Part II analyzes the Vietnamese government's promulgation of labor laws since initiating an economic approach that actively seeks foreign investment.¹⁴ Part III explores the trade union movement and evaluates the ideological and structural transformation of the Vietnamese trade unions.¹⁵ Part IV examines the Labor Law, discussing its progressive framework and controversial provisions as well as its ambiguities and uncertainties.¹⁶ Part V critically examines the internal and external policy decisions leading to the adoption of the Labor Law and analyzes its ramifications on foreign investment.¹⁷

II. EVOLUTION OF THE MARKET-ECONOMY

Of the remaining communist states, Vietnam's leadership has made the strongest commitment to economic reform.¹⁸ The first concessions to market economics came as early as 1979,¹⁹ but in 1986 the Sixth Congress of the Vietnamese Communist Party initiated momentous changes with the economic reform policy of *doi moi*,²⁰ or the new economic thinking.²¹

In an attempt to reinvigorate a stagnant economy and increase foreign investment, the National Assembly enacted a Foreign Investment Law in December 1987 (1987 Foreign Investment Law).²² The new investment policy

14. See *infra* notes 18-62 and accompanying text.

15. See *infra* notes 63-85 and accompanying text.

16. See *infra* notes 86-233 and accompanying text.

17. See *infra* notes 234-249 and accompanying text.

18. WILLIAMS, *supra* note 3, at 39. Adam Fforde, one of the most knowledgeable observers of Vietnam's economy, cites Vietnam as the unitary example of abandoning a centrally-planned economy and achieving successful reforms. *Id.*

19. *Id.* at 44-45. In 1979, the Vietnamese leadership decided to retreat from socialist practices and to implement a policy of reform, which stands as the first move away from the classic Stalinist orthodoxies of a central planning system. *Id.*

20. D.M. Leipziger, *Awakening the Market Viet Nam's Economic Transition*, WORLD BANK DISCUSSION PAPERS iii (1991). *Doi Moi* means "renovation" and refers to the entire reform process initiated by the Vietnamese government in 1986. *Id.* at 1; see Taylor, *supra* note 2, at 469. The reform program of *doi moi* involved: (1) dismantling the collective farm system and returning the land to family farms, (2) removing price controls, (3) promoting the private sector, (4) devaluing the currency, (5) reducing state subsidies and demobilizing the army, (6) revising interest rates to curb inflation, and (7) encouraging foreign investment. *Id.*

21. CHRIS BRAZIER, VIETNAM THE PRICE OF PEACE 22 (1990); see Vikram Khanna, *The Long Haul to Prosperity*, BUS. TIMES, Dec. 16, 1994, at 19-20, available in LEXIS, News Library, Majpap File (finding that by December 1986, Vietnam's economy was in a state of near collapse, with inflation running at around 700%, faltering consumer confidence in the local currency, a serious shortage of basic necessities, and the threat of famine). To stabilize the economy, the government decollectivised agriculture, lifted price controls, allowed greater free market participation in the private sector, and welcomed foreign investment. *Id.*

22. 1987 Foreign Investment Law, *supra* note 5, at 1-10; John Gillespie, *Foreign Investment in SR Vietnam Revisited*, 18 INT'L BUS. LAW. 416, 416-24 (1990); see *Foreign Investment Law Promulgated*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 13, 1988, available in LEXIS, World Library, Txtnws File (detailing the 1987 Foreign Investment Law).

openly invited foreign investors to establish business relations with Vietnam.²³ The government designed the 1987 Foreign Investment Law to expand economic cooperation with foreign countries, upgrade domestic economic development, and promote exports based on effective utilization of labor, natural resources, and other potentialities.²⁴ The 1987 Foreign Investment Law promoted an export-oriented industrialization strategy with the goal of maximizing economic gain from Vietnam's vast natural resources, cheap and productive labor force, and political stability.²⁵

Foreign response to the investment invitation was tepid at best, with many investors hesitant to invest in a communist regime that lacked a system of clearly defined legal rights and obligations.²⁶ In response to the minimal increase in the level of foreign investment, the National Assembly adopted the Law on Foreign Investment with Amendments and Additions in June of 1990.²⁷ On February 6, 1991, the Council of Ministers issued a Decree Regulating in Detail the Implementation of the Law on Foreign Investment.²⁸ The 1991 Decree provided that labor relations were regulated under the Ordinance for Labor Contract and

23. F. Gale Connor, *Vietnam: Trading with the Enemy or Investing in the Future?*, 25 LAW & POL'Y INT'L BUS. 481 (1994), available in WESTLAW, Lpib Database; see 1987 Foreign Investment Law, *supra* note 5, art. 1. The provision states, "The State of the Socialist Republic of Vietnam welcomes and encourages foreign organizations and individuals to invest capital and technology in Vietnam. . . . The state of Vietnam guarantees the ownership of invested capital . . . and provides favorable conditions and simple procedures for investment in Vietnam." *Id.*; *Foreign Investment Law Promulgated*, *supra* note 22, art. 16 (guaranteeing workers' rights through labor contracts).

24. *Foreign Investment Law 1987*, *supra* note 5, pmb. (promoting economic development and increased exports on the principles of efficient utilization of labor and other potential resources); see Yelapaala, *supra* note 10, at 404 (stating export-oriented growth requires a stable and efficient labor force).

25. *Vietnam*, DRESDNER BANK AG, May 10, 1993, at 3, available in LEXIS, World Library, Busanl File (explaining that Vietnam, like most other Southeast Asian nations, is pursuing an export-oriented industrialization policy). Compare with Kwang Suk Kim, *Lessons From South Korea's Experience With Industrialization*, in EXPORT-ORIENTED DEVELOPMENT STRATEGIES: THE SUCCESS OF FIVE NEWLY INDUSTRIALIZING COUNTRIES 59 (Vittorio Corbo et al. eds., 1985) (outlining South Korea's export promotion strategy). The government attained rapid growth by utilizing its highly productive and educated labor force, attracting foreign capital, and enacting legislative policies that benefited foreign investors. *Id.*

26. Connor, *supra* note 23. See *supra* notes 7 & 8 and accompanying text (explaining the need for enforceable laws and regulations in attracting foreign investment).

27. Robert L. Wunker, *The Laws on Vietnam Affecting Foreign Investment*, 28 INT'L LAW. 363, 365 (1994), available in WESTLAW, Tp-All Database; see Law on Foreign Investment, with Amendments and Additions, 30 I.L.M. 930 (1991) [hereinafter 1990 Law on Foreign Investment], available in LEXIS, Intlw Library, Asil File.

28. Decree Regulating in Detail the Implementation of the Law on Foreign Investment, 30 I.L.M. 942 (1991) [hereinafter 1991 Decree], available in LEXIS, Lawrev Library, Ilm File; see also *Overview of the Decree Regulating the Implementation of the Law on Foreign Investment*, THE VIETNAM NEWSLETTER, May 1, 1991, at 97, available in ICSC-UCB, SRV File, Legal Subject (on file with *The Transnational Lawyer*) (outlining business cooperation contracts with foreign corporations and establishing a framework for dispute resolution and labor relations policies in joint ventures).

the Labour Regulation.²⁹ The foreign investment laws were again amended on December 23, 1992,³⁰ and most recently on April 16, 1993, with Decree No. 18-CP.³¹ Vietnam's legislative enactments have been described as the boldest and most liberal foreign investment laws in Asia.³² However, these provisions grant employers wide latitude to either sanction or fire employees who violate internal labor regulations.³³

In addition to the legislative enactments, the Constitution of the Socialist Republic of Vietnam, adopted on April 15, 1992,³⁴ also incorporates substantial labor principles and rights.³⁵ The Constitution establishes trade unions as the socio-political organizations of the working class and laborers.³⁶ In addition, the Constitution requires the state to promulgate labor policies and institutions.³⁷ By including basic labor principles in the Constitution, the Vietnamese government formally announces its intention to represent workers' rights and to protect workers' interests.

29. 1991 Decree, *supra* note 28, at 958 (discussing the 1990 Ordinance for Labor Contract and the Labor Regulation to Enterprises, accompanied by Decree No. 233-HBT). Labor relations within foreign invested enterprises are regulated by the 1990 Ordinance for Labor Contract and the Labor Regulation to enterprises, which is accompanied by Decree No. 233-HDBT [hereinafter Decree 233]. *Id.*; see *Overview of the Decree Regulating the Implementation of the Law on Foreign Investment*, VIETNAM NEWSLETTER, Feb. 6, 1991, available in ICSC-UCB, SRV File, Legal Subject (on file with *The Transnational Lawyer*) (noting that joint venture contracts must contain labor relations policies, including procedures for settling labor disputes, arbitration policies, and contractual obligations); Xuan Hai & Dang Ngoc Chien, *Strikes at a Number of Joint Ventures With Foreign Countries*, F.B.I.S., Aug. 5, 1994, at 96, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*) (citing employers' failure to comply with the labor laws, such as Decree No. 28-HDBT and Decision No. 365, which require owners of enterprises to sign labor contracts, restrict work to eight hours a day, and provide overtime payment at time and a half the normal salary).

30. Wunker, *supra* note 27, at 365 (discussing the Law on Amendment of an Addition to a Number of Articles of the Law on Foreign Investment in Vietnam [hereinafter 1992 Amendments]).

31. *Id.* at 365 (citing the Regulations in Detail for the Implementation of the Law on Foreign Investment in Vietnam, Decree No. 18-CP [hereinafter Regulations 1993]).

32. Michael J. Scown, *As the Embargo Crumbles, Vietnam Prepares for U.S. Investors*, 4 J. INT'L TAX'N 12, 13 (1993), available in WESTLAW, Tp-All Database (characterizing the 1987 Foreign Investment Law as one of the most liberal and favorable laws for investment in Asia); see Wunker, *supra* note 27, at 365 (praising Vietnam's development of foreign investment laws as the boldest and most liberal in Asia).

33. Wunker, *supra* note 27, at 380-81. Employers can fire workers for misconduct; enterprise slowdown or financial hardship; technological changes making jobs obsolete; natural disasters requiring diminished production; employee illness for over six months; termination of employment contracts; or dissolution of the enterprise. *Id.* Management can effectively lower workers' wages by negotiating labor contracts through its own Vietnamese partners, thus circumventing the labor administration offices or service companies. *Id.*

34. *The 1992 Constitution of the Socialist Republic of Vietnam*, BBC, Apr. 29, 1992, available in LEXIS, World Library, Txtwns File [hereinafter *Constitution*].

35. *Id.* arts. 55, 63. Article 55 establishes labor as a citizen's right. *Id.* art. 55. Article 63 provides women the right to equal pay for equal work. *Id.* art. 63.

36. *Id.* art. 10 (providing that trade unions, together with state agencies and socio-economic organizations, serve to protect the interests of workers). See *infra* notes 63-85 and accompanying text.

37. *Id.* art. 56 (outlining the role of the state to prescribe the time of work, wage system, social security insurance, and to encourage the development of other forms of social security insurance for workers).

Vietnam's Constitution and foreign investment laws provide a basic structural framework for protecting workers' rights by establishing general labor provisions. However, despite the foundation provided by these general provisions, the National Assembly deliberated for over eighteen years and rejected more than thirty drafts before finally codifying labor interests in the Labor Law.³⁸ Much of the difficulty and inability in formulating a concrete labor code centered around two competing interests.³⁹ On one hand, the government actively sought foreign investors who were attracted to the productive yet inexpensive Vietnamese labor.⁴⁰ On the other hand, workers demanded higher wages, safer working conditions, and the right to collectively bargain and strike, which the government feared would discourage foreign investment.⁴¹ Many features and characteristics of the Vietnamese labor force attract foreign investors.⁴² The workforce is highly literate, with primary education widespread throughout the country.⁴³ The population is expected to reach about 122 million by the year 2050, and this rapid growth will generate a sharp increase in the number of employable adults.⁴⁴ Demographically, the mortality rate and the fertility rate are decreasing.⁴⁵ Employers look favorably upon Vietnamese culture, which fosters hardworking

38. Tina Diaz, *Labor Law Passed But Does Not Replace Decree 233I*, VIETNAM TODAY, Mar. 1994, at 15, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*).

39. *Vietnamese Union Presses for Rise in Minimum Pay at Foreign Firms*, ASIAN WALL ST. J., Nov. 11, 1994, available in WESTLAW, Wsj-Asia Database (reviewing the conflicting positions held by the Labor Federation, which struggles to reconcile workers' rights, and the State Committee for Cooperation and Investment, which seeks a favorable investment environment).

40. Dana Sachs, *Vietnam: Labour Laws: Part 8 of Our On-Going Series*, VIETNAM INV. REV., Nov. 22, 1993, available in LEXIS, Asiapc Library, Vietnm File; see *Vietnam: Frequent Regulation Changes Can Snag Investment in VN—Report*, *supra* note 12, at 2 (recognizing the Vietnamese workers' desire and ability to rapidly learn new skills is one of foreign investors' strongest attractions to Vietnam); Labor Law, *supra* note 12, art. 11 (noting that the government encourages harmonious labor relations which will increase worker output and expand production); Satyanarayan Sivaraman, *Labor Vietnam: In a Dilemma Over Rising Worker Militancy*, INTER PRESS SERVICE, Nov. 22, 1994, at 2, available in LEXIS, Asiapc Library, Allasi File (emphasizing that Ho Chi Minh City alone has recently attracted over US\$2.9 billion worth of investment largely because of the surplus of cheap and skilled labor); see generally Geoffrey B. Hainsworth, *Human Resource Development in Vietnam*, in VIETNAM'S DILEMMAS AND OPTIONS (Mya Than & Joseph L.H. Tan eds., 1993) (arguing that with low wages and scarce employment, employers expect highly motivated and energetic work from Vietnamese workers).

41. *Vietnam: Right to Strike in New Vietnam Labour Code*, REUTER NEWS SERVICE-FAR EAST, May 24, 1994, available in LEXIS, Asiapc Library, Vietnm File; see *Strike Settled at South Korean Joint Venture*, AGENCE FRANCE PRESSE, Dec. 9, 1994, available in LEXIS, Asiapc Library, Allasi File (emphasizing the minimal impact the Labor Law has had on reducing industrial unrest created by workers' expectation of higher wages and foreign investors' desire for lower wages).

42. Jeff Swiggett, *Foreign Investment in Vietnam: CT&D's Development Strategy*, E. ASIAN EXEC. REP., May 15, 1994, at 23 (discussing the vitality of the Vietnamese people).

43. BANISTER, *supra* note 4, at xii.

44. *Id.* at xiii (explaining the expected working age population will increase until about 2020, when the number of elderly will grow rapidly).

45. *Id.*

and disciplined workers.⁴⁶ The numerical predominance of the homogenous *Kinh* ethnic group reduces the chances of splintering along ethnic, religious, racial, and linguistic lines.⁴⁷ These integral social, cultural, and demographic components of Vietnamese society, if incorporated with economic and political stability, indicate rapid growth and development potential for Vietnam.⁴⁸

Unfortunately, as seen in most developing countries,⁴⁹ growth and economic development will likely come at the expense of workers.⁵⁰ To facilitate foreign investment, the Vietnamese government reduced the minimum wage from US\$50 to US\$35 per month in Ho Chi Minh City, and to US\$30 per month elsewhere.⁵¹ The government apparently intends to retain a comparative advantage over neighboring Southeast Asian nations by reducing the minimum wage and promoting its inexpensive labor force.⁵² Despite the regulatory provisions establishing a minimum wage, many workers actually receive wages well below the baseline minimum level.⁵³ In assessing the government's calculation of the minimum

46. *Id.*; see Hoang Ngoc Nguyen, *The Scope and Prospects of Foreign Investment in Vietnam*, 14 CONTEMP. S. E. ASIA 244, 251 (1992) (finding the Vietnamese workers' readiness and ability to adapt and learn quickly impresses many foreign companies); Hoang Minh Tuan, *Vietnam Labour: Costing Out The Long Term*, VIETNAM ECON. TIMES, May 1994, available in ICSC-UCB, SRV File, Economic Subject (on file with *The Transnational Lawyer*) (affirming the Vietnamese culture of self-improvement and willingness to perform duties when properly trained); Hainsworth, *supra* note 40, at 194 (characterizing Vietnamese workers as dynamic, resourceful, versatile, and reliable by international standards).

47. BANISTER, *supra* note 4, at xiii.

48. *Id.* See Leipziger, *supra* note 20, at 28 (stating a positive aspect of Vietnam's socialist economy has been the government's preoccupation with providing essential social, medical, and educational services to its citizens). Vietnam's state of human capital, measured by health and education indicators, is far higher than would normally be expected of a very low-income country. *Id.*

49. Barnard, *supra* note 9, at 415 (discussing Malaysian labor law and the pressures countries face in choosing between governmental favoritism toward foreign investors and government protections for its workers); see Camellia Ngo, *Foreign Investment Promotion: Thailand as a Model for Economic Development in Vietnam*, 16 HASTINGS INT'L & COMP. L. REV. 67, 69 (1992-93) (analyzing Thailand's development strategy which enabled the country to attract foreign investment without losing national independence).

50. Yelapaala, *supra* note 10, at 404 (crediting enterprises' failure to adequately compensate workers for their real contribution to industrial growth).

51. *Minimum Wage Fixed at US\$35*, VIETNAM INV. REV., May, 1992, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*). Decision No. 242, which lowers the minimum wage, serves to pacify the complaints by foreign investors and Vietnamese workers over the previous US\$50 a month minimum wage established Aug. 29, 1990, by Decision 365. *Id.* See *Vietnamese Union Presses for Rise in Minimum Pay at Foreign Firms*, *supra* note 39, at 13 (stating that, in practice, only unskilled workers are paid the minimum wage, with skilled workers receiving wages in the hundreds of dollars per month).

52. *Labor in Malaysia*, E. ASIAN EXEC. REP., Apr. 1993, at 17-18 (stating the monthly minimum wage for unskilled Malaysian workers is US\$140); *Taiwan—Foreign Labor Trends 1991-92*, MARKET REP., Dec. 17, 1992, at 2, available in LEXIS, Asiapc Library, Allasi File (establishing Taiwan's monthly minimum wage at US\$440); cf. *Thailand*, U.S. DEPT. OF STATE DISPATCH, Feb. 1, 1991, at 14, available in LEXIS, Asiapc Library, Allasi File (describing Thailand's 1990 minimum wage of US\$3.60 [the author concludes that this is the daily wage]). Yelapaala, *supra* note 10, at 404 (hypothesizing that South Korea supported its export-oriented economic policies through a government sanctioned low wage).

53. *Vietnamese Union Presses for Rise in Minimum Pay at Foreign Firms*, *supra* note 39, at 13 (workers in state-owned enterprises make as little as US\$11 a month). The Labor Ministry states the average wage for all state and private enterprise workers is US\$25 a month. *Id.* See *Minimum Wage Fixed at US\$35*,

wage, it appears as though the Vietnamese worker assumes a disproportionate burden in the nation's industrialization process.⁵⁴

The government's refusal to provide stringent enforcement of labor provisions encourages foreign enterprises to pay substandard wages without fear of reprisal.⁵⁵ Labor unrest grows as workers face twelve-hour work days, substandard wages, physical abuse, and dangerous working conditions, therefore, the employers' failure to comply with labor regulations ultimately reduces economic

VIETNAM INV. REV., *supra* note 51 (citing nearly 80% of foreign invested enterprises have failed to pay the US\$50 minimum wage, with another 30% paying less than US\$30); *Vietnam Reconsiders Basic Wage For Foreign Firms*, REUTERS, Mar. 30, 1992, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*) (revealing that of 15,000 Vietnamese workers in foreign companies, only 25% received the US\$50 a month minimum wage, while 60% were paid US\$31 to US\$49, and 15% received below US\$30 a month); *Vietnam Labour: Costing Out the Long Term*, *supra* note 46 (emphasizing employers fail to pay the minimum wage of US\$35 a month and even circumvent the law by prolonging probation periods during which workers' salary is even lower).

54. See Kojo Yelpaala, *In Search of Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies*, 7 J. INT'L L. BUS. 208, 231 (1985) (stating that governmental policies establishing low minimum wages are often oppressive to workers, but effective in attracting foreign investors).

55. Hoai Van, *Vietnam: Regulations Regarding Foreign-Owned Enterprises Reviewed*, VIETNAM INV. REV., Mar. 29, 1993 (explaining that the regulations governing foreign-invested enterprises have been loosely enforced). See Xuan Hai & Dang Ngoc Chien, *supra* note 29, at 95-97 (showing state agencies repeatedly fail to police and enforce prior labor regulations within foreign invested joint ventures); Minh Duc, *Ministry Says Enterprises Neglect Labour Laws; Advocates New Labor Code*, VIETNAM INV. REV., Dec. 6, 1993, available in LEXIS, Asiapc Library, Vietnam File (conceding a majority of foreign invested enterprises fail to follow governmental regulations concerning wages, work time, and insurance). About 70% of the enterprises in Ho Chi Minh City neglect to pay the minimum wage. *Id.*; Van, *supra* (addressing the government's loose enforcement of regulations in foreign invested enterprises as a major cause of labor disputes); Ha Hai, *Vietnam: Inspection Team Visits Quoc Bao Shoe Manufacturing Enterprise*, VIETNAM INV. REV., Apr. 19, 1993 (providing a specific example of a foreign owned enterprise that violated numerous labor regulations, including minimum wage enforcement, overtime payment, holiday leave, and probation periods); see also Duc, *supra* (addressing the problems associated with over 50% of Vietnam's direct foreign invested enterprises failing to follow the country's labor laws). Cf. Sachs, *supra* note 40, at 2 (emphasizing governmental means of enforcing labor violations, including warnings, fines, or prison sentences against enterprises that mistreat workers). But see Hai, *supra* (discussing governmental inspection of a foreign invested enterprise that violated minimum wage, overtime, and training period regulations).

efficiency.⁵⁶ With the cost of living rising rapidly in the urban centers, many Vietnamese workers struggle to maintain their livelihood.⁵⁷

Vietnam is also plagued by a serious scarcity of employment opportunities, which worsens the plight of the working class and exacerbates their unrest.⁵⁸ The surplus of labor creates high unemployment, which results in decreased wages.⁵⁹ Under a centrally planned economy, graduating students could easily enter into government positions, but these jobs are no longer available, and many graduates remain unemployed.⁶⁰ Compounding this problem, rural workers who are willing to work for substandard wages are migrating to the urban centers seeking employ-

56. John Rogers, *Vietnam: Labour, Investment Top Vietnam Assembly Agenda*, REUTER NEWS SERVICE-FAR EAST, May 25, 1994, available in LEXIS, Asiapc Library, Vietnm File. The number of strikes increased from six in 1992 to 17 in 1993, and 11 in the first two months of 1994 in Ho Chi Minh City alone. *Id.*; see Hai & Chien, *supra* note 29, at 95-96 (listing numerous strikes, which resulted from 10 to 12 hour work days, wages below the minimum wage, employers beating and slapping workers, and unbearable working conditions); *Toy Plant Employees Walk out in HCMC*, VIETNAM INV. REV., July 4-10, 1994, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*) (finding that cuts in wages, improper behavior, 12 hour work days, and four night a week shifts prompted strike); *Vietnam: Weekly Reports Strike in South Korean-Run Garment Factory*, REUTER TEXTLINE BBC MONITORING SERVICE: FAR EAST, July 6, 1994, available in LEXIS, Asiapc Library, Vietnm File (reporting a strike protesting management's abusive and offensive behavior); cf. *Command Economy Confronts the Free Market on the Shop Floor*, VIETNAM TODAY, Apr. 1994, at 11, available in ICSC-UCB, Periodical File (on file with *The Transnational Lawyer*) (addressing recent strike demands, including food and travel allowances, better working conditions, reduced working hours, and timely salary payments).

57. *Vietnamese Union Presses for Rise in Minimum Pay at Foreign Firms*, *supra* note 51, at 13. The state-run General Confederation of Labor formally asked the government to increase the minimum wage to US\$50 per month for workers at foreign companies. *Id.* The Confederation asserts that the current US\$35 wage is inadequate to cover workers' living expenses. *Id.*; see *Unions Call for Minimum Wage Hike*, VIETNAM INV. REV., Nov. 21, 1994, available in LEXIS, Asiapc Library, Allasi File (outlining the trade unions' demand for an increase in the minimum wage, which they maintain is insufficient to meet the cost of living in Ho Chi Minh City); cf. Angelina Malhotra, *Vietnam's Labor Movement*, ASIA INC., July 1994, at 46 (discussing the impact of a 30% pay cut and a government instituted 45% income tax). The government, eager to attract foreign investment, seems uninterested in the detrimental impact its policies have on the poor and the working class. *Id.*; *Vietnam: Industrial Action Reported in Hanoi for First Time*, REUTER TEXTLINE BBC MONITORING SERVICE: FAR EAST, Aug. 20, 1994, available in LEXIS, Asiapc Library, Vietnm File (announcing that for the first time, labor unrest reached Vietnam's capital with workers at a state-run enterprise striking over recent pay cuts).

58. *Vietnam*, *supra* note 1, at 4 (claiming unemployment is Vietnam's most critical problem, with levels at 25% and growing); see *Trade Unions Struggle with Free Market*, Nov. 12, 1993, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (reporting that more than 700,000 state workers have lost their jobs since the late 1980s along with a similar number of jobs reduced to part time work); *Viet Nam Restructuring Public Finance and Public Enterprises*, F.B.I.S., Apr. 15, 1992, at 11 (on file with *The Transnational Lawyer*) (explaining Vietnam's employment crisis, which is compounded by the demobilization of over a half million military personnel along with another half million layoffs from state enterprises); *Underpaid Garment Workers Stage Walk-Out*, VIETNAM INV. REV., Aug. 29, 1994, available in LEXIS, Asiapc Library, Vietnm File (scarcity of jobs prompted a workers' strike); Sivaraman, *supra* note 40, at 2 (citing the loss of over one million jobs since the late 1980s, coupled with over one million new workers in the labor market as a major source of unemployment).

59. Ngo, *supra* note 49, at 78.

60. Sachs, *supra* note 40, at 2.

ment.⁶¹ With real wages, health conditions, and the standard of living all deteriorating,⁶² working conditions and worker discontent will be an emerging problem for both the government and foreign investors.

III. THE CHANGING ROLE OF TRADE UNIONS IN VIETNAMESE SOCIETY

The basic tenets of the trade union movement are to improve workers' living conditions and to protect workers' rights and interests.⁶³ The trade unions face dual tasks in achieving these goals. First, the trade unions must balance the competing needs of socialism and capitalism.⁶⁴ Secondly, they must construct policies on a wide variety of issues, including wages, medical care, public welfare, price stability, distribution of income, and employment.⁶⁵ However, in performing these tasks, the trade unions remain under the leadership of the Communist Party of Vietnam.⁶⁶ By incorporating communist party principles and leadership in the trade unions, the government maintains regulatory control over the labor force and can promote its own party philosophy to ensure political stability.⁶⁷ To fund workers' programs, the trade unions receive five percent of the total payments allotted to the social insurance fund.⁶⁸ With this capital, trade unions cultivate

61. Malhotra, *supra* note 57, at 47 (finding that as unemployment reached 20% in Vietnam, a flood of rural workers migrated into the cities, accepting jobs paying as little as US\$10 per month).

62. TRI, *supra* note 4, at 250. See *Do Muoi Addresses Trade Union Congress*, F.B.I.S., Nov. 12, 1993, at 84, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (claiming working and health conditions have been neglected in many enterprises, along with a rise in vocational diseases and fear of labor accidents).

63. THE TRADE UNION MOVEMENT IN VIETNAM 22 (Foreign Languages Publishing House, 1988).

64. *Id.* at 23.

65. *Id.*

66. Nguyen Van Tu, *Renovate The Activities of The Vietnam Trade Union*, J.P.R.S., Sept. 16, 1991, at 1, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (providing that the Vietnam Federation of Trade Unions is a political-social organization led by the Communist Party of Vietnam whose broad goals include eliminating exploitation, building socialism, and defending the nation); see THE TRADE UNION MOVEMENT IN VIETNAM, *supra* note 63, at 39-41 (defining the Vietnam Federation of Trade Unions [VFTU] as the unified system of trade union organizations in Vietnam, with the VFTU Executive Committee directing trade union activities on a national level).

67. *Vietnam Rules Out Independent Trade Unions*, NGUOI VIET, June 10, 1990, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (stating that Hanoi's aging leaders, alarmed by the collapse of communism in Eastern Europe, rejected any suggestion of pluralism and viewed trade unions as a principal means for political change); see Malhotra, *supra* note 57, at 48 (asserting that ultimate trade union approval rests with the national labor confederation). This arrangement allows the government to retain greater control over the trade unions than if independent trade unions existed. *Id.* Cf. *Taiwan—Foreign Labor Trends 1991-92*, *supra* note 52, at 6 (examining governmental oversight of trade unions in Taiwan).

68. THE TRADE UNION MOVEMENT IN VIETNAM, *supra* note 63, at 22.

political and societal knowledge, economic and managerial skills, and scientific and technological training.⁶⁹

With the transition to a market-oriented economy, the trade unions' shortcomings and weaknesses became apparent.⁷⁰ The prior trade union organization was overly bureaucratic, which isolated the organization from the masses and failed to meet workers' interests and needs.⁷¹ Worker nonparticipation in labor organizations demonstrated the failure of trade unions to adequately protect their interests.⁷² In 1990, Nguyen Van Lihn, the General Secretary of Trade Unions, charted a new course for trade unions and redefined their central task.⁷³ Lihn outlined an active role for trade unions, declaring that they should join with business directors, communist youth unions, and party organizations to achieve party goals.⁷⁴ Additionally, he recommended that trade unions shift their work and responsibilities to the trade union locals to foster local participation and unity.⁷⁵

As a result of the structural development, trade unions are no longer restricted to the public sector and are expanding to all economic sectors.⁷⁶ However, trade

69. *Id.* at 24; see *Official's Opinion on Trade Unions Noted*, J.P.R.S., Nov. 22, 1993, at 19-20, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (explaining the need for trade unions to enter into the educational, social and cultural sphere in society as to protect workers' morale, health, and culture).

70. *Nguyen Van Tu Interview on Trade Union Work*, F.B.I.S., May 24, 1991, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*). In an interview with Nguyen Van Tu, Chairman of the Confederation of Vietnamese Workers, Tu addressed the negative side of the market economy and the lack of social justice for working people. *Id.* To facilitate the needed changes, grassroots level trade unions must be allowed to implement measures and take the initiative in initiating labor reform. *Id.*

71. *Hanoi Municipal Trade Union Congress Opens*, F.B.I.S., Sept. 22, 1988, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (summarizing a 1988 report by the Trade Union Congress citing the weaknesses in the trade union organization and failure to outline a strategy to confront the major obstacles to growth).

72. *Id.* The report recommended increased union responsibility for implementing party and state policies and promoting grassroots participation in trade union activities. *Id.*; see *Vietnam Labour Group Taking on Union Role*, Nov. 1992, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (identifying the former primary task of providing socialist education to the working class).

73. *Nguyen Van Linh Addresses Workers Committee*, F.B.I.S., May 18, 1990, at 54, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (defining the central task of trade unions). Trade unions serve to ensure workers' participation in political, social, and business establishments, and to represent individual, collective, and social interests. *Id.* See Malhotra, *supra* note 57, at 46 (defining the General Confederation of Labor as the state run organization governing all unions).

74. *Nguyen Van Linh Addresses Workers Committee*, *supra* note 73, at 54.

75. *Id.* at 55. The local trade unions have a direct impact on workers and implement party and state policies. *Id.* Local trade unions provide a location to perform provincial functions, whether in state enterprises, joint state-private ventures, or private enterprises. *Id.* at 55-56; see *THE TRADE UNION MOVEMENT IN VIETNAM*, *supra* note 63, at 41 (defining the Local Trade Union as the organizational unit of workers from a locality working under the guidance of the National Trade Union).

76. Tran Thi Sanh, *Trades Union Congress Report*, VIETNAM INV. REV., Aug. 16, 1993, available in LEXIS, Asiapc Library, Vietnam File (explaining the extension of trade union membership to trade associations and professional workers, which is diversifying its membership).

unions must develop practices that simultaneously protect workers' interests but do not repress economic growth or threaten political stability.⁷⁷

By 1992, the General Labour Confederation assumed the new role of protecting the workers' interests.⁷⁸ Part of the expansive role for trade unions will include extending union activities beyond the traditional public sector and into all economic sectors in society.⁷⁹ As trade unions move away from their broad based political and ideological organizational structure, they will focus their attention toward immediate local interests.⁸⁰ Instead of merely acting in a political capacity, trade unions will address the practical problems affecting the labor force, including improving education and vocational skills and augmenting worker productivity.⁸¹ Trade unions represent and protect the rights and interests of workers, but still remain a political vehicle and are constrained in their independence.⁸²

However, the development of trade unions in the non-state sector has been impeded by the failure of unions to formulate effective plans to mobilize workers

77. *Trade Unions Struggle With Free Market*, Nov. 12, 1993, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (recognizing the increase in workers' strikes and the need for trade unions to protect workers' interests).

78. *Vietnam Labour Group Taking on Union Role*, Nov. 1992, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*). The General Labour Confederation serves to protect workers' interests in a role similar to that of trade unions in a capitalist country. *Id.* In response, the General Labor Confederation demands a decent minimum wage for the workers, which conflicts with the government's position that inexpensive labor is necessary to attract foreign investment. *Id.*

79. Sanh, *supra* note 76. Trade union form is evolving to include a diversity of trade associations representing a variety of professions and specified workers' interests. *Id.* The General Federation of Trade Unions identified the formation of 480 private sector grassroots trade unions, with over 47,000 members. *Id.* The trade union formation included: 271 cooperative trade unions, 87 private enterprise unions, 80 foreign invested joint venture unions, and 42 trade associations. *Id.* An additional 324 labor associations, with over 58,000 members, have been formed. *Id.* Most of the new grassroots trade unions and associations are directed toward improving working and living conditions by supervising and enforcing labor laws, mediating disputes, and improving workers' rights under collective labor agreements. *Id.*

80. *Vietnam Labour Group Taking on Union Role*, *supra* note 78 (noting the General Labor Confederation's active participation in drafting Vietnam's first Labor Law); see Sanh, *supra* note 76 (citing the diversification of trade unions to include formation in all economic sectors and the renewed focus of protecting workers' interests and rights). Compare with Tu, *supra* note 66, at 1 (specifying the trade union's role to implement the broad political and social policies of socialism and not to focus on local interests or separating workers from the communist leadership).

81. *Official's Opinions on Trade Unions Noted*, F.B.I.S., Nov. 22, 1993 at 19-20, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (trade unions must draft goals and policies to increase workers' competence and expertise in modern developing industries and must facilitate growth by renovating outdated equipment).

82. Tu, *supra* note 66, at 1-2. The trade union provides the strong link between the workers and the Communist party. *Id.* The Communist party must assert its political leadership into the organizational independence of the trade union, but must not replace the trade union's autonomy by removing its decisionmaking power and internal structure. *Id.* To achieve these goals, the party establishes political guidelines for the trade union, and oversees its activities through its control over central leadership positions within the trade union. *Id.*

and to persuade employers of the benefits.⁸³ As trade unions expand their role in Vietnamese society, the government remains committed to retaining control over trade unions, fearing that trade unions may act as a vehicle for creating political change.⁸⁴ By restricting the development of independent trade unions, the government effectively safeguards the economic sector from intrusive labor demands that would detract from Vietnam's attractiveness to foreign investors.⁸⁵

IV. VIETNAM'S LABOR LAW

The government, faced with a rapid increase in strikes which it felt were detrimental to Vietnam's foreign investment policy, enacted the Labor Law to curb strikes and provide protection against abusive foreign investors.⁸⁶ The Labor Law signifies a concerted effort by the Vietnamese government to maintain strict control over employment conditions, trade unions, and the right to strike.⁸⁷ The National Assembly passed Vietnam's first Labor Law on June 17, 1994 with 326 of a possible 332 votes in favor of its provisions.⁸⁸ Vietnam's Prime Minister Vo Van Kiet characterized the Labor Law as a major contribution to the liberalization and development of the country's work force.⁸⁹ He anticipates the Labor Law will create a favorable environment for both workers and employers where all laborers will have the right to freely pursue employment.⁹⁰

83. Sanh, *supra* note 76, at 2 (outlining the modest success of trade unions in persuading workers and businesses of their benefits). Several years ago, trade unions were limited to the public sector, but have expanded into the private sector. *Id.*; see also Do Muoi Addresses Trade Union Congress, F.B.I.S., Nov. 12, 1993 at 84-85, available in ICSC-UCB, SRV File, Trade Union Subject (on file with *The Transnational Lawyer*) (The General Secretary, Do Muoi, addressed the Confederation of Vietnamese Workers with a speech outlining the shortcomings in the effort to improve working conditions). Stipulating that labor disputes are inevitable in a market-oriented system, trade unions must determine the underlying problems that result in labor disputes and formulate negotiations and cooperation to resolve the differences. *Id.*

84. *Vietnam Rules Out Independent Trade Unions*, *supra* note 67 (noting Vietnam's leadership fears that trade unions may form political coalitions and challenge the government's monopoly on control, as was demonstrated in Poland and, several other communist East European nations); see Tu, *supra* note 66, at 3 (proclaiming the trade union's role as a special collaborator for the state and that its organizational independence does not permit separation from the communist party leadership).

85. See Yelapaala, *supra* note 54, at 231 (suggesting that statutes are structured to restrict labor union activities and control the labor force).

86. Diaz, *supra* note 38, at 15 (suggesting that the new Labor Law will primarily affect local Vietnamese private and state owned enterprises). However, foreign investors will be required to follow the Labor Law as well as Decree 233. *Id.*

87. See Yelapaala, *supra* note 54, at 231 (explaining the process by which Southeast Asian nations utilize legislative policy to control labor activities and promote investment).

88. *Right to Strike in Vietnam's First Labour Law*, REUTER NEWS SERVICE—FAR EAST, June 19, 1994, available in LEXIS, Asiapc Library, Vietnm File (discussing the Labor Law's essential provisions).

89. Thanh Lam, *Vietnam: National Assembly Debates Labour Code*, VIETNAM INV. REV., Jan. 3, 1994, available in LEXIS, Asiapc Library, Vietnm File (on file with *The Transnational Lawyer*).

90. *Id.*

The Labor Law protects the workers' right to work, employment rights and benefits. At the same time, the Labor Law protects employers' rights and legitimate expectations, thus creating harmonious and stable employment conditions.⁹¹ The Labor Law codifies the provisions of the Constitution with regard to labor utilization and management.⁹² The following is a discussion of the Labor Law's central provisions which will likely impact foreign investment, therefore the text of these provisions should be carefully analyzed before advising clients of Vietnam's foreign investment environment.

A. General Provisions

The Labor Law governs all workers, organizations, and individuals under labor contracts in any enterprise or sector.⁹³ The Labor Law and other Vietnamese laws govern Vietnamese citizens working in foreign-invested enterprises, foreign or international offices or organizations located in Vietnam, and foreigners authorized to work in businesses in Vietnam.⁹⁴ The Labor Law is inapplicable to state civil servants, state officials, the police and armed forces, or members of political and social institutions.⁹⁵ Moreover, certain provisions are intended to apply against particular government officials, employees, and institutions;⁹⁶ however, the Labor Law fails to specify which government officials, civil-servants, or military officials it actually governs. In effect, the government excludes a large portion of the workforce from the Labor Law's protections.

B. Employment

The Labor Law grants all people the right to work, to choose their profession, to learn a trade, and to improve their occupational skills without discrimination

91. Labor Law, *supra* note 12, pmb1.

92. *Id.*

93. *Id.* art. 2. The Labor Law applies to state run and private enterprises. *Id.* The law also applies to all vocational trainees, apprentices, and household servants. *Id.* But see *Vietnam's Proletariat*, VIETNAM INSIGHT, Sept. 1994, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*) (declaring the Labor Law does not apply to workers in state-owned and private enterprises deemed essential to the national economy). See *infra* notes 94-96 and accompanying text (discussing the Labor Law's limited application).

94. *Id.* art. 3.

95. *Id.* art. 4; see Nguyen Thanh Binh, *Basic Points in Draft Labor Law Discussed*, F.B.I.S., Aug. 9, 1994, at 90 (providing a translation of the original article which appeared in SAIGON GIAI PHONG, May 4, 1994) (on file with *The Transnational Lawyer*). Other legal documents and labor regulations apply to these employees. For instance, the Officers' Law and Military Obligation Law regulates army personnel and the administrative law governs state civil servants and officials. *Id.* Because of the imperfections in the laws, the Labor Law applies to some employees while others are exempted and regulated under other legal documents. *Id.*

96. *Id.* (providing that a number of the provisions of the Labor Law regulate government employees, civil servants, and military personnel).

based on sex, ethnic origin, social class, or religious belief.⁹⁷ Any form of worker mistreatment or forced labor is prohibited.⁹⁸ A worker must be at least fifteen years old with sufficient labor skill and the capacity to enter into a labor contract.⁹⁹

The Labor Law also contains numerous employers' rights, including the right to recruit workers, direct labor, and protect themselves against disciplinary violations by workers.¹⁰⁰ Employers may appoint representatives to negotiate collective labor agreements and must cooperate with labor unions when discussing labor relations.¹⁰¹

In addition to providing specific benefits, the Labor Law also imposes obligations and responsibilities on employers. Employers must retrain any employee who has worked regularly in an enterprise for more than one year and is discharged as a result of production or technology changes.¹⁰² The employer must then provide employment for the retrained employee, or compensate the employee for the loss of employment.¹⁰³ It is unclear whether employers must retrain employees that have been discharged for reasons other than production or technological changes. The Labor Law does not state whether an employer is required to secure a retrained employee a position within the same enterprise or if the employer could find the employee a position in a different enterprise. Beyond the foregoing, in assessing the relative cost of labor, foreign investors may be forced to calculate additional costs associated with employee job placement.

When an employer plans to discharge a number of workers, the employer must first consult with the executive committee of the corporate labor union.¹⁰⁴

97. *Id.* art. 5; see Binh, *supra* note 95, at 90 (providing the right to choose one's profession without discrimination based on sex, nationality, social class, and religious belief).

98. Labor Law, *supra* note 12, art. 5.

99. *Id.* art. 6. The Labor Law states that a laborer should be at least 15 years old, so apparently the law does not give employers discretion in regard to hiring underage workers. *Id.* art. 7; see Nguyen Van Phu, *Labor Law Provokes Mixed Response*, VIETNAM INV. REV., May 1994, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*). Vietnam is believed to have considered a working age of 15 years because, in reality, companies are employing workers that young. *Id.*; Letter from Michael J. Scown, Partner from the law office of Russin and Vecchi, to author (Feb. 23, 1995) (on file with *The Transnational Lawyer*) [hereinafter Scown Letter] (explaining that the Labor Law provisions are mandatory and define the minimum requirements which must be followed). The Director of the Legal Department from the Ministry of Labor confirmed the compulsory nature of the Labor Law provisions. *Id.*

100. Labor Law, *supra* note 12, art. 8.

101. *Id.*

102. *Id.* art. 17. The employer must provide retraining so that the employee can perform under the structural or technological changes. *Id.*

103. *Id.* If an employer is unable to provide new employment for a dismissed employee, the employer must pay an allowance on the basis of a month's salary for each year of work, but the total payment should not be less than two months pay. *Id.*

104. *Id.* art. 17. The consultation with the executive committee of the corporate labor union must be in accordance with the procedures under Article 38, section 2. See *infra* note 114 and accompanying text (setting forth the provisions of Article 38).

The employer is then required to display a public list of the workers to be fired.¹⁰⁵ The government establishes vocational training, job loss allowances, retraining, and low interest loans to help assist these discharged workers find new employment.¹⁰⁶

C. Labor Contracts

A labor contract serves as an agreement between the worker and employer detailing employee wages, working conditions, and the rights and obligations of both parties.¹⁰⁷ The labor contract should entail the following: work responsibility, working hours, rest time, wages, work site, term of contract, labor safety conditions, labor sanitation, and social insurance.¹⁰⁸

The Labor Law provides that if a worker is hired for a trial period, the wage of the worker should be at least seventy percent of the wage for a regular worker performing the same job.¹⁰⁹ The trial period should not extend beyond sixty days for highly skilled workers and thirty days for all other workers.¹¹⁰

The Labor Law establishes regulations for the unilateral termination of a labor contract.¹¹¹ An employee working in accordance with a labor contract lasting from one to three years, or a seasonal labor contract, or a contract for less than one year may unilaterally terminate the labor contract.¹¹² A worker who unilaterally terminates a labor contract must serve the employer with notice.¹¹³

105. *Id.* art. 17. The public list of workers should be compiled in consideration of the needs of the enterprise and the workers' seniority, skills, family circumstances, and other individualized factors affecting the worker. *Id.*

106. *Id.*

107. *Id.* art. 26.

108. *Id.* art. 29.

109. *Id.* art. 32.

110. *Id.* Article 129 defines high-skilled workers as those workers with a high level of expertise and technical skills. *Id.* art. 129. See Phu, *supra* note 99, at 1 (citing the importance of addressing the trial period in the Labor Law). Many of the prior strikes involved employers extending the trial period beyond the 30 day period, which aggravated workers' discontent and resulted in strikes. *Id.*

111. Labor Law, *supra* note 12, arts. 37-39.

112. *Id.* art. 37.

A worker may unilaterally terminate under the following conditions:

- (a) the worker is not given the proper job at the proper work site and is not guaranteed the working conditions under the contract;
- (b) the employer does not comply with the terms of payment under the contract;
- (c) he or she is ill-treated or forced to labor;
- (d) real family problems prevent the worker from completing the contract;
- (e) the worker accepts a governmental position;
- (f) a female worker is pregnant and is instructed by a doctor to take leave.

Id.

113. *Id.* Pursuant to Article 37, a worker must give notice of:

(1) at least three days in cases of (a), (b), and (c) ;

(2) when (d) and (e) apply, at least 30 days if the labor contract is for a term of one to three years, and at least three days if the labor contract is seasonal or for less than one year.

Employers can unilaterally terminate a labor contract under Article 38, but Article 39 limits the cases in which termination is permissible.¹¹⁴

D. Collective Labor Agreements

A collective labor agreement is a document agreed upon between an organized group of workers and the employer covering conditions of labor and the rights and obligations of each side in the labor relationship.¹¹⁵ A collective labor agreement may be formed for a period covering one to three years.¹¹⁶ If a business signs a collective agreement for the first time, the agreement cannot extend beyond one year.¹¹⁷ Employers assume all costs incurred in the formation, implementation, and modification of a collective agreement.¹¹⁸ Additionally, employers are responsible for reimbursing the workers' representatives for all costs associated with negotiating and forming the collective agreement.¹¹⁹

E. Wages

Employee wages are based on labor productivity, quality, and efficiency of work, and may not be lower than the minimum wage set by the state.¹²⁰ Workers

Id.

114. *Id.* arts. 38-39. Article 38 allows an employer to terminate a labor contract under the following circumstances: the worker fails to complete the contractual terms of employment; a worker is discharged under disciplinary measures; sickness for a protracted period of time; natural disasters prevent the employer from completing the proposed employment; or the enterprise ceases operation. *Id.* art 38. Article 39 prohibits termination of a labor contract if:

- (a) a worker becomes sick or is injured by a labor accident or professional disease, except where the worker has been sick for a protracted period, or the employer is forced to reduce the workforce because of a natural disaster, fire, or an uncontrollable event;
- (b) the worker is on annual leave or takes an unexcused leave for personal reasons;
- (c) a female worker is discharged because the enterprise ceases operation.

Id. art. 39.

115. *Id.* art. 44.

116. *Id.* art. 50.

117. *Id.* Before a collective agreement can be modified or supplemented, the parties must wait at least three months after signing an agreement lasting less than one year, and at least six months for a contract lasting one to three years. *Id.* However, the three month provision contradicts Article 50, which allows collective agreements ranging from one to three years, but does not provide for agreements of a shorter duration. *Id.*

118. *Id.* art. 53.

119. *Id.*

120. *Id.* art. 55. *See Vietnamese Strike at Korean-Owned Plant: Higher Wages Demand and Alleged Attack on Worker Prompt Discord*, FIN. TIMES, Dec. 7, 1994, at 4, available in LEXIS, Asiapac Library, Allasi File (discussing the government's failure to enforce the minimum wage as a substantial factor in workers' decision to strike and assert their legal rights). *See supra* notes 52-56 and accompanying text (discussing the government's failure to enforce minimum wage laws).

must be paid directly, in full, and in cash.¹²¹ Workers must be informed of any deductions in their wages and employers are prohibited from cutting employee wages as a disciplinary measure.¹²² Workers receive overtime payment for additional hours worked beyond the regular working day.¹²³ In cases of corporate merger, business partition, or transfer of ownership, management, or business assets, the succeeding employer should pay the workers' wages and benefits.¹²⁴ If a business declares bankruptcy, employee obligations have first priority in debt settlement.¹²⁵

The Labor Law sets up a general framework for determining the minimum wage, which considers the cost of living by a worker performing the simplest work under normal working conditions.¹²⁶ However, the Labor Law fails to fix a price and leaves the amount to be determined by the state at a later date.¹²⁷ It should be of primary importance for the government to ensure the compliance with the minimum wage laws because an enterprise's failure to fulfill its legal obligation often incites workers' discontent and leads to strikes.¹²⁸

121. Labor Law, *supra* note 12, art. 59. Employers cannot delay payment for longer than a month and must compensate the employee by including interest on the salary at the interest rate set by the state during the period of delay. *Id.* The parties can agree to receive their paycheck by either corporate or state issued checks. *Id.*

122. *Id.* art. 60. Employers should discuss any deductions with the executive committee of the corporate labor union before making actual deductions on workers' wages. *Id.* The total sum deductible is 30% of the workers' monthly wages. *Id.*

123. *Id.* art. 61. Workers receive overtime payment for extra working hours in the following ways:

(a) On working days, the overtime payment should be at least 150% of the hour-wage of a normal work day;

(b) On holidays, overtime payment should be at least 200% of the hour-wage of a normal work day; if overtime work is performed at night, the worker receives, in addition, at least 30% of the wage applied to day-time work.

Id.

124. *Id.* art. 66. It is unclear whether the succeeding employer can exercise discretion in honoring the rights and obligations of workers.

125. *Id.* When bankruptcy occurs, the wages, allowances for job termination, social insurance, and other benefits provided for in the collective agreements or labor contracts will be first in order of debt settlement. *Id.*

126. *Id.* art. 56 (providing that the minimum rate serves as the basis for determining wages for other forms of labor). *Id.* art. 55 (basing the minimum wage on the labor productivity, quality, and efficiency of work performed).

127. *Id.* art. 56. The government is to set the minimum wage in each region and the rate applicable to each industry. *Id.*; see Rogers, *supra* note 56 (stating that the Labor Law sets a framework for a national minimum wage, but does not fix the amount).

128. Sachs, *supra* note 40. The minimum wage reduction to US\$35 a month was intended to give foreign investors an incentive to hire Vietnamese workers. *Id.* Despite the wage reduction, employers continue to pay wages below the minimum wage, which causes workers to strike. *Id.*

F. Labor Discipline

In order to build harmonious labor relations and protect the legitimate interests of both the workers and employers, the Labor Law outlines workers' rights, responsibilities, and disciplinary measures.¹²⁹ Workers must obey labor laws, respect their employers' authoritative and managerial rights, and protect the workplace assets, commodities, and machinery.¹³⁰

The Labor Law requires any business employing more than ten workers to formulate written labor bylaws and regulations.¹³¹ The labor bylaws should cover: work and break time; order within the enterprise; workplace safety and sanitation conditions; protection of assets, technology, and enterprise secrets; violations of the labor regulations; and forms of labor discipline.¹³² To ensure that employees are familiar with the labor regulations, employers are required to post the main points at accessible places in the enterprise.¹³³

Workers who violate any labor regulation or discipline provision may be punished either by reprimand, transfer to a lower wage job for up to six months, or termination.¹³⁴ The Labor Law limits an employer's right to terminate an employee's labor contract.¹³⁵ Specifically, a worker may be fired only for committing theft, revealing trade secrets, or severely damaging the enterprise's economic interests.¹³⁶ Furthermore, discharge is appropriate when a worker was previously disciplined by transfer to a lower paying job and subsequently commits another offense, or if the worker is absent from work for seven days in a month or for twenty days in a year without a legitimate excuse.¹³⁷ By specifically enumerating the available labor discipline forms, the Labor Law eliminates some of the former disciplinary methods. Such prohibited measures include issuing warnings, lowering a worker's technical grade, and transferring a worker to a lower paying job for an unlimited period of time.¹³⁸ The stringent disciplinary provisions create

129. Labor Law, *supra* note 12, art. 82.

130. *Id.* art. 83; see Nguyen Thang Binh, *Lawyer Explains Contents of New Labor Law*, F.B.I.S., Oct. 5, 1994, at 81 (providing a translation of the original article which appeared in SAIGON GIAI PHONG, Aug. 1, 1994) (outlining workers' obligations).

131. Labor Law, *supra* note 12, art. 82. Before the labor bylaws are issued, the employer should consult the corporate labor union. *Id.* The employer should then register the bylaws with the provincial labor authority. *Id.*

132. *Id.* art. 83.

133. *Id.*

134. *Id.* art. 84 (stating that employers cannot apply several disciplinary measures against an employee for a single regulation violation).

135. *Id.* art. 85.

136. *Id.* After firing a worker, the employer should notify the provincial labor authority of the disciplinary action. *Id.*

137. *Id.*

138. Binh, *supra* note 130, at 81.

stable expectations among employees and workers, which ultimately heightens Vietnam's attractiveness to foreign investors.¹³⁹

The Labor Law addresses the statute of limitations for labor discipline and establishes disciplinary time limits.¹⁴⁰ A worker's infraction must be raised by the employer within three months of the date of the offense, though the law allows an extension of up to six months in special circumstances.¹⁴¹ In a labor disciplinary proceeding, a worker may either defend himself, procure legal counsel, or receive help from the people's defense counsel or any other outside source.¹⁴² The worker in question and representatives of the executive committee of the corporate labor union must be present at the disciplinary proceeding.¹⁴³

In order to engender worker responsibility and protection of corporate assets, the employees are held accountable for damage to enterprise equipment.¹⁴⁴ If a worker negligently damages equipment or tools, the worker must repay the enterprise, but the maximum amount of indemnity is three months pay with gradual deductions taken from the worker's wages.¹⁴⁵ Workers who lose tools or operate their equipment beyond the permissible level must indemnify the loss.¹⁴⁶ In case of an uncontrollable event, a worker will not be required to indemnify the employer.¹⁴⁷

If a worker's violation of labor regulations creates a complicated situation where continued employment makes it difficult for the employer to prove the violation, the enterprise may temporarily suspend the employee.¹⁴⁸ The suspension ordinarily cannot exceed fifteen days.¹⁴⁹ However, in special circumstances,

139. *Vietnam: Frequent Regulation Changes Can Snag Investment in VN—Report*, *supra* note 12, at 3. Isabelle Michelet, manager of the Corporate Resource Group for Thailand and Indochina, believes that Vietnam's Labor Law, designed to place greater restrictions on employers, still remains a good selling point for the country. *Id.* Experience in Thailand demonstrates that less restrictive workers' rights and regulations ultimately result in worker strife. *Id.* Negotiations and settlement agreements increase employers' overall cost. *Id.*

140. Labor Law, *supra* note 12, art. 86.

141. *Id.* The Labor Law does not outline situations where the six month extension is appropriate.

142. *Id.* art. 87.

143. *Id.*

144. *Id.* art. 89; *see* Binh, *supra* note 130, at 81 (recognizing that workers are responsible for even slight damage from their carelessness).

145. Labor Law, *supra* note 12, art. 89.

146. *Id.* art. 90. The compensation amount is based upon the current market price of the equipment. *Id.* If the matter is covered by a signed labor contract, the reimbursement will be the amount agreed upon in the contract. *Id.*

147. *Id.* (adding in case of force majeure [an unexpected or uncontrollable event], the employee will not have to indemnify the employer); *see* Binh, *supra* note 130, at 82 (stating employees can escape liability for damaged tools if they have a valid reason for their action).

148. Labor Law, *supra* note 12, art. 92; *see* Binh, *supra* note 130, at 82 (stating the employer must consult with the corporate labor union before suspending the worker).

149. Labor Law, *supra* note 12, art. 92.

the suspension can last up to three months.¹⁵⁰ The short period serves to provide sufficient time for the employer to resolve the matter while also protecting the legal rights of the worker.¹⁵¹ Prior to the suspension, the employee can demand a payment of fifty percent of the salary that the worker would have received during the period of suspension.¹⁵² At the end of the suspension period, employers must pay the remainder of the full wage to any employee who is cleared from responsibility.¹⁵³ Yet, the worker has no legal obligation to repay the advanced portion of the salary, and the employer cannot demand recompensation, even if the worker is reprimanded for the offense.¹⁵⁴

To ensure that a sanctioned worker receives fair and equitable treatment, a worker has the right to appeal to the employer, a labor authority, or may request negotiations for settlement in accordance with legal procedures.¹⁵⁵ If an authoritative body concludes that the employer's sanctions were improper, the employer must rescind the decision and make a public apology to restore the worker's dignity.¹⁵⁶ Since Vietnamese culture regards dignity and respect as paramount, the public apology is an important step in ensuring that future labor disputes are avoided.¹⁵⁷

G. Regulations for Female Workers

As expressed in the Constitution,¹⁵⁸ the Labor Law requires equality for female and male workers in all respects.¹⁵⁹ The Labor Law strictly prohibits employers from discriminating against women because of their gender.¹⁶⁰ The state is responsible for securing equal treatment for women in a variety of fields, including improving working conditions, enriching health and welfare, and

150. *Id.* The Labor Law does not define what constitutes special circumstances and allows a three month suspension.

151. Binh, *supra* note 130, at 82.

152. Labor Law, *supra* note 12, art. 92.

153. *Id.* (noting that the employer must pay any allowances for the period of temporary suspension).

154. *Id.*; see Binh, *supra* note 130, at 82 (stating that if a worker is guilty and punished, the employer has no right to demand repayment of the advanced salary).

155. Labor Law, *supra* note 12, at 92; see Binh, *supra* note 130, at 82 (recognizing the need for a democratic labor environment, the Labor Law authorizes workers to appeal any decision with the proper jurisdictional authority).

156. Labor Law, *supra* note 12, art. 94.

157. Binh, *supra* note 130, at 82 (the public apology serves to restore the worker's honor and respect within the enterprise); see BRAZIER, *supra* note 21, at 3 (commenting on Vietnamese inherent value to dignity and cultural independence); Tran Dinh Thanh Lam, *Frenchman Accused of Humiliating Employees*, VIETNAM INV. REV., Sept. 12-18, 1994, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*) (discussing how the public apology serves to restore a worker's dignity and honor).

158. Constitution, *supra* note 34, art. 63 (requiring equality between the sexes).

159. Labor Law, *supra* note 12, art. 109.

160. *Id.* art. 111.

guaranteeing equal pay.¹⁶¹ When filling employment vacancies, employers should give priority to qualified female applicants.¹⁶² The Labor Law does not discuss the operation or enforcement of the preferential hiring policy. The Labor Law forbids employers from firing a female employee solely because she marries, becomes pregnant and takes leave, or cares for children under one year of age.¹⁶³

The law provides further protections for women by allowing a pregnant female worker the right to unilaterally terminate a labor contract without incurring personal liability if she receives an official note from a doctor stating that continuation of work will adversely affect the fetus.¹⁶⁴ During pregnancy and after childbirth, female workers may take leave for four to six months, depending upon the government regulations for the type of work.¹⁶⁵ A female worker who has paid into the social insurance fund receives her normal wage during her maternal leave.¹⁶⁶ In addition, after the maternity leave expires, a female worker can extend her leave without pay with her employer's consent.¹⁶⁷ The Labor Law provides many protections for pregnant female employees, but then presents them with a difficult option after giving birth. Should a female worker return to work before her maternity leave expires, but not earlier than two months after delivery and without a doctor's approval, she is entitled to receive her maternity allowance as well as her normal wages.¹⁶⁸ A female worker faces the opportunity of receiving both her maternal leave and normal wage by returning to work soon after pregnancy, or completing her maternal leave and foregoing the prospect of earning additional salary.

161. *Id.* art. 110.

162. *Id.* art. 111. Scown Letter, *supra* note 99, at 2 (stating that the provision is mandatory on its face). However, the Minister of Labor claims that no enforcement mechanisms exist. *Id.* Even if a claim is raised against an employer, a female applicant would have difficulty proving that she was similarly situated to her male counterpart. *Id.*

163. Labor Law, *supra* note 12, art. 111 (stating that if the enterprise goes out of business, the protective provision does not apply).

164. *Id.* art. 112 (providing the pregnant female employee does not have to indemnify the employer as would normally be required under Article 41 for unilaterally terminating a labor contract); *see id.*, art. 41 and accompanying text (discussing the procedures for unilateral termination of labor contracts by employers).

165. *Id.* art. 114. The factors affecting maternal leave include the nature of the work, the conditions under which the work is performed, and the work location in relation to the worker's residence. *Id.* If the mother has triplets, she may take an additional 30 days leave. *Id.*; *see* Binh, *supra* note 130, at 82 (stating that it is the government's duty to select the types of employment subject to the maternity regulations and the leave period).

166. Labor Law, *supra* note 12, art. 114 (regulating maternal rights under Articles 141 and 144). Article 141 mandates compulsory social insurance in any enterprise employing over 10 workers. *Id.* art. 141. Female workers may receive an additional month's salary when giving birth to their first or second child. *Id.* art. 144; *see* Binh, *supra* note 130, at 83 (providing that under Article 117, pregnant female workers receive a social insurance payment for time they take off for medical examinations, family planning measures, involuntary abortion or miscarriage treatment, care for a sick infant, or adoption of a new child).

167. Labor Law, *supra* note 12, art. 114.

168. *Id.*

The Labor Law also requires that enterprises employing female workers must have a changing room, a bathroom, and a women's restroom.¹⁶⁹ Where the enterprise employs a large number of women, there must either be a nursery or kindergarten, or a wage increase to cover day care expenses.¹⁷⁰ Further, businesses employing many female workers must assign someone from the corporate management to oversee female labor problems.¹⁷¹ These provisions appear to offer stringent protections for female employees; however, the law fails to define the parameters for the number of workers required to trigger the provisions. Furthermore, although the law mandates a wage increase to cover day care expenses, it neglects to specify a percentage or framework for computing the allowance. There is still some doubt whether female workers will exercise their legal rights and demand enforcement of the special regulations for female workers or whether the government will take the initiative to secure the newly provided rights.

H. Labor Unions

Workers rights are secured by labor unions, state units, economic organizations, and social organizations.¹⁷² These groups act as the protectorates of workers' interests and participate in the inspection, supervision, and implementation of the Labor Law.¹⁷³ The Labor Law requires all continuing enterprises without an existing labor union to form a labor union within six months of the implementation of the Labor Law.¹⁷⁴ A newly formed business has six months from the start of operation to form the union.¹⁷⁵ Prior to the union formation, the provincial labor federation will form a provisional labor union at the business in order to represent the workers' rights and benefits.¹⁷⁶

The Labor Law actively encourages worker participation in labor unions. Employers must not discriminate against or use economic leverage or schemes against any worker because of the worker's participation or leadership in a labor union.¹⁷⁷ If a worker has specified duties in the labor union, the worker still

169. *Id.* art. 116.

170. *Id.*; see Binh, *supra* note 130, at 82-83 (discussing the requirement for day care or kindergarten facilities).

171. Labor Law, *supra* note 12, art. 118.

172. *Id.* art. 12.

173. *Id.*

174. *Id.* art. 153. It should be noted, however, that the government exempts many government organizations, institutions, and employees from the Labor Law's mandates. See *supra* notes 93-95 and accompanying text (outlining the excluded enterprises).

175. Labor Law, *supra* note 2, art. 153.

176. *Id.*

177. *Id.* art. 154.

receives his or her regular wage while carrying out the labor union tasks.¹⁷⁸ Time allotments for labor union activities will vary depending on the size of the enterprise, but an employee should receive at least three working days a month to perform non-specialized labor union duties.¹⁷⁹ Depending on the collective agreement or corporate charter, full time union workers enjoy the same benefits and rights as employees of an enterprise.¹⁸⁰ Before an employer can fire a worker who is a member of the labor union executive committee in the enterprise, the employer must first obtain consent from the trade union executive committee.¹⁸¹ The pre-discharge consent requirement provides executive committee members with the freedom to actively manage labor union activities without fear of employer reprisal or retaliatory firing.

The Labor Law encourages an expansive role for trade unions within foreign invested enterprises. Trade union activity opens the channels of communication between workers and employers, which should reduce misunderstandings and create a favorable working environment.¹⁸²

I. Labor Dispute Settlement

Labor disputes are inevitable in a market economy and typically concern rights and interests related to jobs, wages, working conditions, labor contracts and collective agreements, and apprentice training periods.¹⁸³ The labor union provisions establish guidance for workers and employers in resolving disputes.¹⁸⁴ Labor disputes may be settled by the following methods: direct negotiation and mutual agreement between the parties; arbitration; open settlement; and labor union representative participation.¹⁸⁵ Parties involved in a labor dispute may participate directly or use representatives, withdraw or modify a claim, and change the

178. *Id.* art. 155. See Scown Letter, *supra* note 99, at 2 (explaining that employees who work part time in a trade union may use a portion of their work time to perform trade union activities while still receiving full pay from the employer).

179. *Id.* art. 155.

180. *Id.*

181. *Id.* If the worker is the chairperson of the executive committee, the employer must first obtain consent from the directly superior labor union organization. *Id.*

182. *Cheap Labor Attracts Influx of Foreign Investors*, F.B.I.S., July 8, 1994, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*) (citing that less than 20% of foreign invested enterprises have trade unions and over 80% of strikes occurred in enterprises without trade unions). Trade union formation allows dialogue between the parties and should reduce the number of strikes. *Id.* See Hai & Chien, *supra* note 29, at 95-97 (stating the goal of most strikes is to ensure compliance with labor laws and to establish trade unions within the enterprises to represent workers' interests).

183. Labor Law, *supra* note 12, art. 157; see Binh, *supra* note 130, at 85-86 (proposing the inevitability of labor disputes and classifying them as either individual or collective labor disputes).

184. Labor Law, *supra* note 12, art. 156; see Binh, *supra* note 130, at 86 (discussing the state's guidance for settling labor disputes).

185. Labor Law, *supra* note 12, art. 158.

arbitrator if fairness and objectivity cannot be maintained.¹⁸⁶ In the event that the employers and workers cannot resolve a conflict, the state must intervene directly and resolve the labor dispute.¹⁸⁷

1. Jurisdiction in Personal Labor Dispute Resolution

A variety of entities potentially maintain jurisdiction over individual labor disputes. The entities charged with resolving labor disputes include the corporate labor conciliation board;¹⁸⁸ the labor conciliators agencies in districts, province towns, and cities without a corporate labor conciliation board; or the People's Court.¹⁸⁹

When a labor dispute arises in an enterprise, the matter is presented to the labor conciliation board.¹⁹⁰ The labor conciliation board offers solutions to the parties, the terms and conditions of which must either be accepted or refused.¹⁹¹ If both sides accept the proposal, an arbitration report is drafted and both parties are bound to formalize and honor the agreement.¹⁹² If the parties fail to reach agreement on the terms of the solution, the board records the parties' positions in a draft arbitration report and sends the file to the District People's Court for resolution.¹⁹³ In enterprises that do not have a labor conciliation board, an arbitrator from the district conciliation board will carry on the arbitration process in the same form as the labor conciliation board.¹⁹⁴

Though the labor conciliation boards will probably be successful in resolving many labor disputes,¹⁹⁵ the District People's Court will likely have to solve those

186. *Id.* art. 160. In the process of settling the dispute, the parties should provide documents and evidence to the arbitrator, execute any agreements that have been made between the parties, and implement decisions made by the People's Court. *Id.*

187. *Id.* art. 156.

188. *Id.* art. 163. A corporate labor conciliation board is formed when an enterprise has 10 or more workers. The board must consist of an equal number of representatives of both workers and employers. *Id.* Members of the corporate labor conciliation board serve for 2 years. *Id.*

189. *Id.* art. 162; see *Economic Courts: Resolving Disputes*, VIETNAM ECON. TIMES, Sept. 1994, at 34, available in ICSC-UCB, Periodical File (on file with *The Transnational Lawyer*) (stating that the People's Court is divided into three tiers: the Supreme People's Court, Provincial People's Courts in centrally managed cities (i.e. Hanoi, Ho Chi Minh City), and District People's Courts).

190. Labor Law, *supra* note 12, art. 164. The labor conciliation board has seven days from the date of the arbitration request to resolve the dispute. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* Either party to a dispute can request that a dispute be handled by the District People's Court. *Id.*

194. *Id.* art. 165.

195. See generally Mark Lockwood & Nguyen Tan Hai, *Labor Mediator a Must to Settle Possible Disputes*, Sept. 19, 1994, available in ICSC-UCB, SRV File, Labor Subject (on file with *The Transnational Lawyer*).

conflicts that are exceptionally antagonistic and bitter.¹⁹⁶ Upon request of either party, the District People's Courts will settle any individual labor dispute that the labor conciliation board or the labor arbitrator failed to resolve.¹⁹⁷ However, the Labor Law fails to specify the process in which the District People's Court will resolve labor disputes.

In order to ensure that certain individual labor disputes are quickly resolved, the Labor Law sets forth two circumstances in which an individual may proceed directly to the District People's Court without first consulting the corporate labor conciliation board.¹⁹⁸ The first case arises with a dispute over a disciplinary discharge or over the unilateral termination of a labor contract.¹⁹⁹ The second situation occurs with a dispute over compensatory damages owed to employers.²⁰⁰ The aggrieved employee receives an additional benefit from this expedited process. Namely, once the People's Court retains jurisdiction, the employee does not have to pay any legal expenses for actions regarding wages, social insurance, labor accident payments, professional diseases coverage, wrongful discharge, or breach of labor contract payments.²⁰¹

To avoid prolonged delays before legal claims are raised, the Labor Law establishes a statute of limitations for labor dispute settlement which begins to run on the date of the event leading to the dispute.²⁰² A worker has one year to raise a claim where the dispute arises from disciplinary dismissal or from compensatory damage payments to the employer.²⁰³ All other labor disputes must be raised within six months.²⁰⁴

196. Lockwood & Hai, *supra* note 195. Cf. David Howell, *Vietnam's Courts and Legal Profession*, E. ASIAN EXEC. REP., Mar. 15, 1992, at 19, available in LEXIS, World Library, Easian File (adopting the view that many foreign enterprises refrain from utilizing the District People's Courts due to the judges' lack of education and experience in commercial disputes).

197. Labor Law, *supra* note 12, art. 166.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*; see Binh, *supra* note 130, at 86 (listing circumstances where employees are exempted from legal expenses).

202. Labor Law, *supra* note 12, art. 167.

203. *Id.*

204. *Id.*

2. Jurisdiction and Procedures for Resolving Collective Labor Disputes

Three primary agencies retain jurisdiction when a collective labor dispute arises: the corporate labor conciliation board,²⁰⁵ the provincial labor arbitration council,²⁰⁶ and the People's Court.²⁰⁷

The corporate labor conciliation board must act within seven days of a request for settlement.²⁰⁸ At the conciliation meeting, representatives from both sides participate in the dispute resolution process.²⁰⁹ The labor conciliation board promotes dialogue between the parties and formulates an arbitration settlement plan.²¹⁰ If the parties accept the corporate labor conciliation board's solution, the agreement must be signed by both parties to constitute a binding agreement.²¹¹ If the two sides cannot reach a consensus, the conciliation board records the disputing parties' positions and registers its own position.²¹²

If the parties submit the dispute to the provincial arbitration council, the council has ten days to resolve the matter.²¹³ If the collective workers do not consent to the labor arbitration council's decision, they may either strike or refer their case to the People's Court.²¹⁴ If an employer does not agree with the provincial labor arbitration council's agreement, the employer may request that the People's Court reconsider the arbitration council's decision.²¹⁵ However, the fact that an employer has asked the People's Court to revise the decision has no bearing upon the workers' right to strike.²¹⁶

205. *Id.* art. 168. Where a corporate conciliation board does not exist, the labor conciliator of a district level labor agency is empowered to resolve a labor dispute. *Id.* See *id.* art. 163 (defining the corporate labor conciliation board).

206. *Id.* art. 169. The provincial labor arbitration council is composed of representatives of labor unions and organizations, employer representatives, and a number of respected lawyers, administrators, and social workers from the community. *Id.* The council consists of an odd number of members not exceeding nine persons, and it is chaired by the representative of the provincial labor organization. *Id.*

207. *Id.* art. 168. See Howell, *supra* note 196, at 19 (stating that the People's Courts at the district, province or city, and national level have jurisdiction over civil and commercial claims).

208. Labor Law, *supra* note 12, art. 170.

209. *Id.*

210. *Id.*; see Binh, *supra* note 130, at 86 (adding that both sides must review the arbitration proposal).

211. Labor Law, *supra* note 12, art. 170.

212. *Id.* art. 164. Either party may then submit the labor conciliation board's recommendation to the provincial arbitration council. *Id.*

213. *Id.* art. 171. At the provincial settlement meetings, the disputing parties' representatives must be present. *Id.* In certain cases, the provincial labor arbitration council will invite delegates from outside labor unions or concerned state authorities to the conciliation meetings. *Id.*

214. *Id.* art. 172.

215. *Id.*

216. *Id.*

3. Workers' Strike

The right of collective workers to strike to secure their rights is the most controversial provision of the Labor Law.²¹⁷ The right to strike is generally associated with the collective rights of workers, but it is also related to surrounding economic, political, and social issues.²¹⁸ Because of the potential for abuse, the Labor Law provides a rigid framework within which workers can strike and prevents the use of strikes to achieve other objectives.²¹⁹

Before the trade union executive committee can declare a strike, over half of the collective workers must approve the strike.²²⁰ Once the workers approve a strike, the corporate labor union executive committee decides whether to declare a strike.²²¹ If the executive committee declares a strike, they must draft a strike petition and communication which clearly outlines the issues leading to the controversy, the workers' demands, the result of the workers' vote, and the pending strike deadline.²²² The executive committee selects a delegation of no more than three representatives to deliver the petition to the employer and sends the communication to both the provincial labor council and the provincial labor federation as notice of the forthcoming strike.²²³

Though workers possess the right to strike, the Labor Law prohibits employees from committing specific acts during a strike.²²⁴ Specifically, striking workers are forbidden from engaging in violence, damaging enterprise property and equipment, or committing acts that impinge on public order and safety.²²⁵ In addition, the following strikes are prohibited: strikes not arising out of collective labor disputes or extending beyond the sphere of labor relations; strikes outside the scope of enterprise activities; strikes called while the provincial arbitration council or People's Court are attempting to resolve a labor dispute; strikes in which the requisite worker approval has not been obtained; and strikes in public enterprises essential to the economy or national security.²²⁶ The People's Court

217. *Id.* art. 173.

218. Binh, *supra* note 130, at 87.

219. *Id.* See *infra* notes 220-227 and accompanying text (specifying the procedures that must be followed prior to declaring a strike).

220. Labor Law, *supra* note 120, art. 173. The strike can be approved by either casting a secret vote in favor or gaining the requisite number of signatures. *Id.*; see Binh, *supra* note 130, at 87 (outlining the procedure for declaring a strike).

221. *Id.* art. 173.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*; see Binh, *supra* note 130, at 87 (claiming harmful acts to public order and safety include fighting and creating disturbances).

226. Labor Law, *supra* note 12, art. 176.

has the final authority either to permit a strike in the enterprise, or to declare the strike illegal.²²⁷

Furthermore, the Labor Law prevents employers from retaliating against striking workers by means of harassment or other retributive devices.²²⁸ Any individual obstructing a legal strike, committing illegal acts during a strike, or refusing to abide by a directive from the Prime Minister or the People's Court could face civil liability for economic losses, administrative fines, or criminal prosecution.²²⁹

In addition to prohibiting specific conduct during a strike, the Labor Law prohibits strikes in certain public service businesses and enterprises essential to the national economy, security, or defense.²³⁰ The government has not provided details about the potentially large number of enterprises where the right to strike might be restricted.²³¹ Furthermore, critics assert that the government is provided too much latitude in determining those enterprises deemed essential to the national economy.²³² It is unclear how the government will respond when a quasi-public enterprise, including those run by the army, Interior Ministry, or families of party officials, experiences a strike.²³³ Since the Labor Law provides the government immense latitude in defining the parameters of a strike, a workers' right to strike is anything but absolute.

V. CONCLUSION

Vietnam's ambitious economic strategy provides foreign investors with a tremendous opportunity to participate in one of the fastest growing markets in the

227. *Id.* art. 177.

228. *Id.* art. 178.

229. *Id.*

230. *Id.* art. 174. See Le Quoc, *Draft Law Establishes Workers Right To Strike*, VIETNAM INV. REV., Apr. 25, 1994, at 1, available in WESTLAW, Int-News Database (explaining that "essential business enterprises" include health care, public transportation, and water and power suppliers).

231. Labor Law, *supra* note 12, art. 174 (noting that a list will be provided at a future date). Scown Letter, *supra* note 99, at 3 (providing that the government intends to compile a list with the Decree on Strikes, which may include such enterprises as telephone companies, water supply companies, and electric companies).

232. *Vietnam's Proletariat*, *supra* note 93 (contending that by dubiously phrasing an exemption for industries of national importance, the government can construe virtually any enterprise to be of national importance, which in effect nullifies the right to strike). But see *Vietnam: 32 Strikes in the First Ten Months*, VIETNAM INV. REV., Nov. 14, 1994, available in LEXIS, Asiapc Library, Allasi File (noting that 17 of the 32 labor strikes reported in Vietnam during the first 10 months of 1994 occurred in state enterprises, which may suggest the government will not take an overly expansive view of what constitutes an essential enterprise). However, the article does not identify the types of public enterprises that experienced strikes. *Id.*

233. *Vietnam's Proletariat*, *supra* note 93 (contending that the state's involvement in industry coupled with the state's right to decide which industries are essential takes away the right to strike from many Vietnamese workers).

world.²³⁴ To counter the rising activism and discontent among Vietnamese workers, the Labor Law establishes a framework for dispute resolution and settlement.²³⁵ However, the government's underlying motivation behind the Labor Law appears to reflect its desire to promote stability and appease foreign investors who fear labor strife.²³⁶ Although the current labor environment remains relatively stable, workers' dissatisfaction over the inequitable distribution of wealth may harness worker activism and lead to organized rebellion.²³⁷ The formation of labor unions within enterprises may also remove some of the leverage foreign enterprises maintain over workers, but the labor union's strength will depend upon the level of participation and activism within each specific enterprise.²³⁸ Although the potential for conflict remains, the government's political control over the labor unions and workforce should provide additional security to foreign investors.²³⁹

Vietnam desires the economic rewards that come from a market-oriented capitalistic system, but it fears the new economic openness will create political instability.²⁴⁰ The steps taken to open Vietnam's markets to foreign investors can be characterized as an economic success,²⁴¹ but that success comes at the expense of the Vietnamese worker.²⁴² The Labor Law signifies a concerted effort by the

234. Swiggett, *supra* note 42, at 23 (claiming that the vitality of the Vietnamese people, coupled with the economic restructuring and vast national resources, will likely foster rapid development). See *Vietnam's Transition to a Market Economy*, E. ASIAN EXEC. REP., Dec. 15, 1993, at 1, available in LEXIS, World Library, Easian File (stating that Vietnam's notable economic gains hint at the economy's tremendous potential); Nguyen, *supra* note 46, at 250 (describing Vietnam as the last frontier for investment in the fastest growing economic regions in the world).

235. See *supra* notes 183-233 and accompanying text (discussing dispute resolution procedures).

236. See *supra* notes 52-54 and accompanying text (proposing that export-oriented legislation favors foreign investment at the expense of labor).

237. See *supra* notes 55-57 and accompanying text (addressing the increase in workers' strike and discontent with employment conditions); cf. Yelapaala, *supra* note 10, at 414 (noting that industrial legislation often fails to compensate workers for their real contributions to economic development).

238. See *supra* notes 172-182 and accompanying text (explaining labor union formation within enterprises). Scown Letter, *supra* note 99, at 4-5 (reporting that in January 1994 there were seven strikes in Vietnam, as compared to no strikes reported to the Minister of Labor, Invalids, and Social Affairs since the Labor Law's implementation).

239. See *supra* notes 66-67 and accompanying text (discussing the communist party control over trade union activities and policies).

240. Scown, *supra* note 32, at 12-13. See *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995, 1996 (1994) (discussing the heightened impact of the Vietnamese strong sense of nationalism and the government's continued embrace of a communist political system on foreign direct investment).

241. Vietnam, *supra* note 25 (discussing Vietnam's economic improvements since adopting free market principles). The advancements include an 8% increase in the Gross Domestic Product, a decrease in inflation from previous levels of 300% down to nearly 30%, and significant improvements in agricultural exports. *Id.*

242. Sivaraman, *supra* note 40 (discussing the negative effects of foreign investment, including expanded industrial renewal and worker militancy on issues ranging from minimum wages to improved working conditions); see Barnard, *supra* note 9, at 415 (addressing the government's choice between favoritism toward foreign investors and protection of workers' social and economic welfare). See generally RAYMOND VERNON, *STORM OVER THE MULTINATIONALS THE REAL ISSUES* 113 (Harvard Univ. Press 1977) (discussing labor's

socialist state to fulfill its obligations to the working class, but without governmental enforcement, the Labor Law acts as little more than a symbolic gesture.²⁴³

Since the Labor Law only became effective on January 1, 1995, a great deal of uncertainty remains as to the impact or effect the law will have upon foreign investors.²⁴⁴ The Labor Law confronts numerous controversial labor rights the government viewed as the cause of discontent and dispute, so rigid enforcement of the law may actually increase the attractiveness of Vietnamese labor.²⁴⁵ If the government is committed to protecting workers' rights, economic policies directed at achieving peaceful coexistence between workers and foreign investors is possible.²⁴⁶ However, if the current economic development continues and the workers become further alienated from the proportionate economic gains, the possibility of a Tiananmen-style workers' revolt or a Russian-style economic downturn is conceivable.²⁴⁷

In the context of international trade and development, labor issues are surfacing and may become increasingly important factors in terms of collective trade agreements and international human rights.²⁴⁸ Though the members of the Association of Southeast Nations (ASEAN) formally reject any connection of labor conditions to trade, the United States is beginning to analyze the link

tenuous bargaining position). When placing demands on foreign enterprises, workers must balance their demands against the constant threat that the enterprise will withdraw from the hostile environment and relocate to a peaceful working environment. *Id.*; Yelapaala, *supra* note 10, at 404 (discussing workers' inherent lack of bargaining power). Any demands for greater wages and benefits will jeopardize employment and may drive foreign investors to countries with lower labor costs. *Id.*

243. See *supra* notes 41, 49-57 and accompanying text (discussing foreign investment's adverse effects on workers).

244. See *supra* notes 236-239 and accompanying text.

245. See *supra* notes 56-57 and accompanying text (listing workers' demands for improved labor conditions).

246. Malhotra, *supra* note 57, at 49.

247. *Id.* See *Vietnam Rules Out Independent Trade Unions*, *supra* note 67, at 262 (indicating that the Vietnamese leadership feared that the political upheaval in Eastern Europe would spread to Vietnam). Following the Tiananmen Square attack on prodemocracy students, the Vietnamese government took measures to ensure that a similar scenario would not occur in Vietnam, including normalizing relations with China and blaming former Soviet President Mikhail Gorbachev for the crisis facing communism. *Id.* See also Sivaraman, *supra* note 40, at 3 (stating that a worst case scenario for the socialist political system in Vietnam would be a working class rebellion, which is a strong possibility if the demands of the Vietnamese workers are not met).

248. *Asia and the Pacific*, THE IRISH TIMES, Nov. 17, 1994, at 19, available in LEXIS, News Library, Majpap File. U.S. President Clinton warned Indonesian leaders that repression of trade union activities would not be acceptable. *Id.* Linkages to foreign trade will be more important as Southeast Asia comes under increased scrutiny by the U.S. *Id.* But See Merrill Goozner, *Asian Labor: Wages of Shame; Western Firms Help to Exploit Brutal Conditions*, CHI. TRIB., Nov. 6, 1994, at C3, available in LEXIS, Asiapc Library, Allasi File (discussing that U.S. President Clinton's appeal to put worker rights on the agenda of the World Trade Organization which was created under the new GATT accord received minimal support from Western European nations and was decisively defeated by a united front of developing East Asian nations). The East Asian nations claim that as the nations move up the economic ladder, they will raise the standard of living and allow the greater freedoms demanded by human rights activists. *Id.* However, labor and human rights advocates claim that such arguments merely act to conceal the authoritarian governments' repressive acts against the poor. *Id.*

between trade and labor standards.²⁴⁹ Now investors must wait to assess the government's enforcement of the Labor Law and its relative impact on Vietnam's labor force, enterprise management, and inflow of foreign investment.

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249. *ASEAN Members Oppose Linkage of Labor and Trade, Official Says*, INT'L TRADE REP., Aug. 3, 1994, at 12-14. The U.S. Undersecretary for Economic and Agricultural Affairs expressed that the kinds of rights the U.S. hopes to enforce include child labor, prison labor, and freedom of association, but not the imposition of wage rates that could influence comparative advantage. *Id.* See Philippe Agret, *Vietnam Strives for Legal Reforms to Support Market Economy*, AGENCE FRANCE PRESSE, Oct. 27, 1994, available in LEXIS, Asiapc Library, Allasi File (Vietnam appears to hold the view that human rights and individual liberties are imported western concepts that are suited to richer countries). However, the Labor Law is an important step in the codification of workers rights. *Id.*

